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E-FILED ON MAY 9, 2006

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Proposed Attorneys for Debtors and Debtors-in-Possession

## UNITED STATES BANKRUPTCY COURT

## DISTRICT OF NEVADA

In re:  
 USA COMMERCIAL MORTGAGE COMPANY,  
 Debtor.

Case No. BK-S-06-10725 LBR  
 Case No. BK-S-06-10726 LBR  
 Case No. BK-S-06-10727 LBR  
 Case No. BK-S-06-10728 LBR  
 Case No. BK-S-06-10729 LBR

In re:  
 USA CAPITAL REALTY ADVISORS, LLC,  
 Debtor.

Chapter 11

In re:  
 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,  
 Debtor.

**Jointly Administered Under  
 Case No. BK-S-06-10725 LBR**

In re:  
 USA CAPITAL FIRST TRUST DEED FUND, LLC,  
 Debtor.

**DECLARATION OF DOUGLAS MONSON  
 IN SUPPORT OF EMERGENCY MOTION  
 FOR ORDER TO COMPEL FIDELITY  
 NATIONAL TITLE INSURANCE  
 COMPANY TO MAKE DISBURSEMENTS  
 FROM LOAN FUNDS BEING HELD BY  
 FIDELITY AS DISBURSEMENT AGENT  
 AND IN SUPPORT OF MOTION FOR  
 EXPEDITED HEARING (AFFECTS USA  
 COMMERCIAL MORTGAGE COMPANY)**

In re:  
 USA SECURITIES, LLC,  
 Debtor.

Affects:  
☐ All Debtors  
☒ USA Commercial Mortgage Company  
☐ USA Securities, LLC  
☐ USA Capital Realty Advisors, LLC  
☐ USA Capital Diversified Trust Deed Fund, LLC  
☐ USA First Trust Deed Fund, LLC

Date: OST Requested  
 Time: OST Requested

SCHWARTZER & MCPHERSON LAW FIRM  
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Douglas M. Monson, Esq. of Ray Quinney & Nebeker P.C., attorneys for the above captioned debtor and debtor-in-possession (the "Debtor"), under penalties of perjury, hereby declares on this 9<sup>th</sup> day of May, 2006 that:

1. Debtor has authorized the filing of an Emergency Motion To Compel Fidelity National Title Insurance Company To Make Disbursements From Loan Funds Being Held By Fidelity As Disbursement Agent (the "Emergency Motion"). The Emergency Motion requests that the Court enter an order granting the Emergency Motion to prevent further damages to Debtor and to the borrowers (the "Borrowers") on five loans originated by Debtor (the "Five Loans") from the unilateral decision by Fidelity National Title Insurance Company ("Fidelity") to stop making disbursements on the Five Loans from loan funds being held by Fidelity as disbursement agent because of the filing of Debtor's Chapter 11 bankruptcy petition. The Five Loans are the Meadow Creek Loan, the Binford Medical Loan, the ComVest Capital Loan, the Palm Harbor One Loan, and the Brookmere Loan. Debtor has also authorized the filing of a Motion for Expedited Hearing on Emergency Motion To Compel Fidelity National Title Insurance Company To Make Disbursements From Loan Funds Being Held By Fidelity As Disbursement Agent (the "Motion for Expedited Hearing").

2. I have been in contact with Robert Bozarth, Senior Vice President and NTS Counsel for Fidelity, with respect to Fidelity's decision to stop making disbursements on the Five Loans. Attached hereto as Exhibits "A" and "B" and incorporated herein are true and correct copies of two letters that I forwarded on behalf of the Debtor to Robert Bozarth of Fidelity on May 5, 2006, demanding that Fidelity immediately begin making disbursements on the Five Loans.

3. As of 10:30 a.m. Mountain Daylight Time on May 9, 2006, Fidelity had not responded to my May 5, 2006 demand letters, and had not agreed to begin making disbursements on the Five Loans.

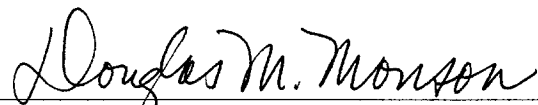
4. I spoke by telephone with Robert Bozarth, attorney for Fidelity, on Friday afternoon on May 5, 2006, after I sent to Robert Bozarth my first letter to him dated May 5, 2006. The only reason that Robert Bozarth gave to me for Fidelity's unilateral decision to stop making disbursements on the Five Loans was Fidelity's concern that there may be a precedent set for the

1 return of loan proceeds to investors at the hearing scheduled for May 18, 2006, on the Debtor's  
 2 Motion for Order Authorizing the Return to Investors of Certain Escrowed Funds Intended for the  
 3 Bundy Canyon Project (the "Bundy Canyon Motion") that was e-filed in Bankruptcy Case No.  
 4 BK-S-06-10725 on April 27, 2006.

5 5. As explained in my second letter to Robert Bozarth dated May 5, 2006, which is  
 6 attached hereto as Exhibit "B," the Bundy Canyon Motion addresses a completely separate issue  
 7 from the disbursement issues for the Five Loans for which Fidelity is acting as disbursement  
 8 agent. The funds involved in the Bundy Canyon Motion had been deposited with a title company  
 9 in an escrow account, but the loan had not been closed or funded when Debtor's Chapter 11  
 10 bankruptcy petition was filed, and the Debtor determined to not complete the loan transaction, so  
 11 the loan was never consummated.

12 6. As stated in the Bundy Canyon Motion, "[i]n the event that a loan is not  
 13 consummated, Nevada law requires the funds held in the Escrow Account to be returned to the  
 14 investors. Nev. Rev. Stat. 645B.175(2)(b)." Because the Bundy Canyon loan was not  
 15 consummated, the Bundy Canyon Motion explains that the Bundy Canyon funds were never  
 16 funded to a disbursement agent such as Fidelity, and were in a position to be returned to the  
 17 investors on an unfunded loan. The Bundy Canyon Motion does not have any impact on the Five  
 18 Loans, which have been consummated, with the associated loan funds having been sent to  
 19 Fidelity, which is acting as disbursement agent.  
 20

21 Respectfully submitted on May 9, 2006.

22  
 23 

24 Douglas M. Monson, Utah Bar No. 2293  
 25 RAY QUINNEY & NEBEKER P.C.  
 26 36 South State Street, Suite 1400  
 27 P.O. Box 45385  
 28 Salt Lake City, Utah 84145-0385  
 Attorneys for Debtor and Debtor-In-Possession

**EXHIBIT "A"**

RAY QUINNEY & NEBEKER

May 5, 2006

Via Facsimile & Via E-Mail

Robert Bozarth  
Fidelity National Title  
Senior Vice President and NTS Counsel  
7130 Glen Forest Dr., Suite 403  
Richmond, VA 23226  
Fax No. (804) 673-3318  
Fax No. (804) 673-2219  
Regular No. (804) 287-0905

Re: In re USA Commercial Mortgage Company  
Bankruptcy No. BK\_S-06-10725 LBR (Bankr. D. Nevada)

Dear Bob:

I have not heard back from you with respect to our phone discussion earlier this week. Could you please call me immediately about the serious breaches of contract being committed by Fidelity National Title Insurance Company ("Fidelity") in failing to make disbursements to the Borrowers under the various Construction Disbursement Agreements (the "Disbursement Agreements") entered into by Fidelity with respect to loans originated by USA Commercial Mortgage Company ("USA")? Fidelity's failure to disburse is creating enormous problems for the Borrowers under these Disbursement Agreements and is impairing the ability of USA as debtor-in-possession to conduct its operations in the ordinary course of business. Moreover, we understand that Fidelity is also failing to disburse interest payments from interest reserves being held by Fidelity to USA as servicing agent for the investors in the various loans originated by USA ("Servicer"), which is creating additional problems for USA.

Article II, Section (d)(4) of the Construction Disbursement Agreements prepared by Fidelity clearly states: "On the Disbursement Date, if (i) all the terms and conditions of the Loan Agreement and this Agreement have been complied with by Borrower, (ii) no Default or Event of Default exists under the Loan Agreement, (iii) [USA as Servicer] has approved the Request for Disbursement and sent to CDS [Fidelity] Instructions to Disburse, and (iv) CDS [Fidelity] has received the Disbursement from [USA as Servicer] and all of the documents and information required herein, **then CDS [Fidelity] shall disburse the requested Disbursement** (less any required Retainage and less amounts payable to and advanced by [USA as Servicer] to the Contractors entitled to payments thereunder)." (Emphasis added). Nothing could be plainer. In those cases where USA as Servicer has approved the Request for Disbursement and sent to Fidelity the required Instructions to Disburse under a Disbursement

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Liesel B. Stevens  
Melissa Herring Bailey

Robert Bozarth  
Fidelity National Title  
May 5, 2006  
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Agreement, and Fidelity has received the disbursement amount from USA as Servicer and all other documents and information required by the Disbursement Agreement, **then Fidelity is obligated to comply with the terms of the Disbursement Agreement and immediately make the required disbursements both to the Borrower and to USA as Servicer for interest payments from interest reserves.**

We note that Article III, Section (a) of the Disbursement Agreement provides: "CDS [Fidelity] further agrees to indemnify, hold harmless and defend [USA as Servicer] and its successors and assigns from and against any and all claims, losses, costs or damages, including attorney's fees, caused by, incurred or resulting from CDS's [Fidelity's] gross negligence and/or intentional misconduct in connection with any activities performed by CDS [Fidelity] pursuant to this Agreement." It is USA's view that Fidelity's failure to disburse constitutes gross negligence as well as a serious breach of contract.

We do not understand why Fidelity is not following USA's disbursement instructions and making disbursements to the Borrower and to USA as Servicer. This breach by Fidelity is causing significant damages to both the Borrowers and to USA. For example, we have been advised that the Borrower on the Binford Medical Developers loan is being threatened with mechanic's liens for unpaid contractor bills that may cause the project to be shut down. We have also been advised that Fidelity's failure to make disbursements on the Palm Harbor One, LLC loan is creating operational problems for that condo conversion project, and that Fidelity's failure to forward interest payments from the interest reserve has caused this loan to fall into a non-performing status.

If your client is concerned that the necessary authorizations for disbursements have not been given by the authorized officers for USA as Debtor-in-Possession, we have enclosed a copy of the Interim Order Authorizing the Employment and Retention of Thomas J. Allison of Mesirow Financial Interim Management, LLC as Chief Restructuring Officer for the Debtors and Debtors-in-Possession, which was entered by the Bankruptcy Court on April 19, 2006. Mr. Allison ratifies previous authorizations given by USA for the disbursements under the Disbursement Agreements to continue, consistent with the terms of the Disbursement Agreements. If Fidelity needs additional written authorization from Mr. Allison, please let me know immediately.

We can only assume that Fidelity mistakenly believes that USA's bankruptcy filing has suspended Fidelity's obligations under the Disbursement Agreements, and that Fidelity can safely sit back and do nothing until the Bankruptcy Court tells Fidelity what to do. That is not correct. Bankruptcy Court authorization and directions to Fidelity are not necessary under these circumstances.



Robert Bozarth  
 Fidelity National Title  
 May 5, 2006  
 Page 3

Section 363(c)(1) of the Bankruptcy Code provides that a debtor in possession authorized to operate its business under 11 U.S.C. § 1108 “may enter into transactions, including the sale or lease of property of the estate, **in the ordinary course of business**, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.” (Emphasis added). While the Bankruptcy Code and the legislative history of Section 363(c) do not define “ordinary course of business,” the Ninth Circuit (controlling law for the United States Bankruptcy Court for the District of Nevada where USA’s bankruptcy case is pending) has stated that the courts interpreting this section have provided helpful and persuasive guidelines under two tests: “(1) [the] vertical dimension or creditor’s expectation test and (2) [the] horizontal dimension test.” *Burlington Northern Railroad Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 704 (9<sup>th</sup> Cir. 1988).

The horizontal dimension test measures “an industry-wide perspective in which the debtor’s business is compared to other like businesses. In this comparison, the test is whether the postpetition transaction is of a type that other similar businesses would engage in as ordinary business.” *Id.* Under the horizontal dimension test, “a transaction occurs in the debtor-in-possession’s ordinary course of business when there is a showing that the transaction is the sort occurring in the day-to-day operation of debtor’s business.” *Id.*

Under the vertical dimension test, a transaction is viewed from the vantage point of a hypothetical creditor, and inquiry is made whether the transaction subjects such creditor to economic risks of a nature different from those he or she accepted when he or she decided to extend credit to the debtor. *Id.* at 705. Under this test, some transactions by their very size or nature are not within the day-to-day operations of the debtor’s business and are therefore considered to be extraordinary and not ordinary course of business transactions. *Id.* The debtor-in-possession’s prepetition business activities are compared to its postpetition transactions under the vertical dimension or creditor’s expectation test to determine if the postpetition transactions are in the ordinary course of business. *Id.*

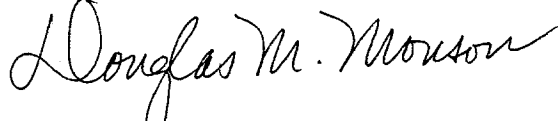
Under either the horizontal dimension test or the vertical dimension test, USA’s acts in authorizing disbursement agents such as Fidelity to continue to make disbursements to the Borrowers and to USA as Servicer under written Disbursement Agreements are clearly in the “ordinary course of business” for USA as Debtor-in-Possession. Providing such disbursement authorizations is clearly the sort of activity that mortgage servicing businesses such as USA engage in on a daily basis. Likewise, USA was routinely engaging in these same activities during its prepetition existence as a Servicer. These activities are not extraordinary, but are the types that are customarily expected of mortgage servicers such as USA.

Robert Bozarth  
Fidelity National Title  
May 5, 2006  
Page 4

We expect and demand that Fidelity immediately make the disbursements under its Disbursement Agreements that have been previously authorized by USA as Servicer. If Fidelity fails to do so immediately, Fidelity will be held accountable for the damages that it is causing for all parties. If for any reason you are unable to reach me today, you can also speak to my colleague, Steven Strong, at the same general number for our firm. Please call us as soon as possible **today** and let us know that Fidelity has started making the authorized disbursements under the Disbursement Agreements.

Very truly yours,

RAY QUINNEY & NEBEKER P.C.

A handwritten signature in black ink that reads "Douglas M. Monson". The signature is fluid and cursive, with the first name "Douglas" being more prominent.

Douglas M. Monson

Enclosure

cc: Thomas J. Allison (via e-mail, w/encl.)  
Monty Kehl (via e-mail, w/encl.)  
John W. Graub II (Attorney for Binford Medical Developers) (via e-mail, w/encl.) (E-mail: [jwg@hostetler-kowalik.com](mailto:jwg@hostetler-kowalik.com))  
Kevin Doig (Regional Manager for Palm Harbor One, LLC) (via e-mail, w/encl.) (E-mail: [kdoig@cypressfallscondos.com](mailto:kdoig@cypressfallscondos.com))  
Annette W. Jarvis w/encl. via e-mail  
Steven C. Strong w/encl. via e-mail

873762 v1





Entered on Docket  
April 19, 2006

*Bruce A. Markell*

Hon. Bruce A. Markell  
United States Bankruptcy Judge

SCHWARTZER & MCPHERSON LAW FIRM

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Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re:  
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

Case No. BK-S-06-10725 LBR  
Chapter 11

**INTERIM ORDER AUTHORIZING  
THE EMPLOYMENT  
AND RETENTION OF THOMAS J.  
ALLISON OF MESIROW  
FINANCIAL INTERIM  
MANAGEMENT, LLC AS CHIEF  
RESTRUCTURING OFFICER  
FOR THE DEBTORS AND DEBTORS-  
IN-POSSESSION**

Date: April 17, 2006  
Time: 1:30 p.m.

Before the Court is the Motion of USA Commercial Mortgage Company ("USACM"), on behalf of itself and its affiliated debtors, which are USA Securities, LLC ("USAS"), USA Capital Realty Advisors, LLC ("USARA"), USA Capital Diversified Trust Deed Fund, LLC ("Diversified Fund"), and USA Capital First Trust Deed Fund, LLC ("First Deed Fund") (collectively, the "Debtors"), requesting authority to retain and employ Thomas J. Allison ("Allison") of Mesirow Financial Interim Management, LLC ("MFIM") as chief restructuring officer of the Debtors, (the "Motion") pursuant to the terms of the Agreement attached to the Allison Declaration as Exhibit "A" (the Agreement"). Based upon the Motion, the attachments thereto, and the Declaration of Thomas J. Allison (the "Allison Declaration"), and it appearing that the relief sought in the Motion is appropriate and warranted,

IT IS HEREBY ORDERED that:

1. The Motion is GRANTED and the employment of Allison and MFIM as provided in the Agreement is approved.

2. From the date of the filing of the petition until July 27, 2006, the Debtors are authorized to employ Allison as Chief Restructuring Officer ("CRO"), and other employees of MFIM will be employed as temporary employees. Allison will have complete and exclusive charge of the management and operation of the Debtors' business, including hiring and firing employees and agents, paying the wages and other compensation of all of the Debtors' employees and agents, and controlling all bank accounts and financial affairs of the Debtors, paying all bills, expenses and other charges incurred or payable with respect to the operation of the Debtors' business.

3. As provided in the Agreement, the professional services that Allison, with the support of MFIM, will render include the following:

- a. Develop and implement case management strategies, tactics and later develop a plan of reorganization;
- b. Manage the professionals who are advising and assisting the Debtors in the reorganization process to ensure the individual work product is consistent with the Debtors' overall restructuring goals;

- c. Lead management with the development of a business plan, and such other related forecasts as may be required by the Debtors to support the reorganization and related negotiations with stakeholders;
- d. Communicate and/or negotiate with creditors, equity security holders, their advisors, and other outside stakeholders;
- e. Serve as the representative for the Debtors during communications with the Securities and Exchange Commission and the Nevada Mortgage Lending Division;
- f. Provide the Debtors with any Investigative Services, Accounting Analyses, and Transaction Tracing, as may be deemed necessary or appropriate;
- g. Supervise the preparation of periodic reporting required by the Bankruptcy Court and/or the US Trustee, manage the claim reconciliation process, and provide testimony before the Bankruptcy Court on matters that are within MFIM's area of expertise; and render such other service as may be deemed necessary as part of the reorganization process.

4. Allison and MFIM are required to apply to this Court for allowance of compensation and reimbursement of expenses in accordance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules and the Local Rules and Orders of this Court. Subject to this Court's approval and as provided in the Agreement, the Debtors propose to pay Allison and MFIM at their customary hourly rates in effect from time to time as set forth in the Allison Declaration, and as may be directed and allocated by Court order.

5. The retainer that MFIM received shall be held and applied to its allowed final compensation and expense reimbursement and any unused portion shall be returned to the USACM. MFIM applied \$250,000 to pre-petition services. Any amounts in excess of pre-petition fees will be held as an additional retainer. The fees for pre-petition services as well as the fees for post-petition services are subject to review and approval by this Court.

6. In addition to the fees and retainer, the Debtors are authorized to pay an insurance premium in the amount of \$550,000 to obtain directors' & officers' liability coverage for Allison in his capacity as CRO.

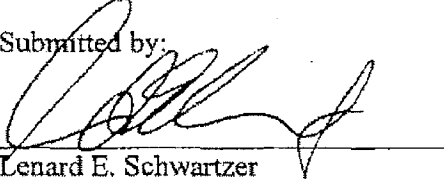
7. Debtors shall indemnify and hold harmless MFIM and its shareholders, affiliates, principals, members, managers, officers, directors, employees, subcontractors, attorneys, professionals, representatives and agents against any and all losses, claims, damages, liabilities,

1 penalties, obligations and expenses, including, without limitation, the costs and expenses for  
2 counsel and others (including employees of MFIM), based on their then current hourly billing  
3 rates in investigating, preparing or defending any action or claim, all as set forth in detail in the  
4 Standard Terms and Conditions attached to the Allison Declaration.

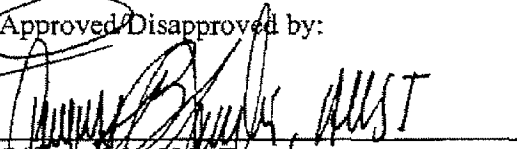
5 8. The Court will consider an extension of the employment of Allison and MFIM on  
6 July 27, 2006 at 9:30 a.m.

7 9. Notice of this Order and the hearing on July 17, 2006 shall be given by first class  
8 mail to all creditors of each of the Debtors, all investors in First Deed Fund and Diversified Fund,  
9 and to all investors whose loans are being serviced by USACM.

10 Submitted by:

11   
12 Lenard E. Schwartz  
13 Nevada Bar No. 0399  
14 Jeanette E. McPherson  
15 Nevada Bar No. 5423  
16 Schwartz & McPherson Law Firm  
17 2850 South Jones Boulevard, Suite 1  
18 Las Vegas, Nevada 89146-5308  
19 Attorneys for Debtors

20 Approved/Disapproved by:

21   
22 Office of the U.S. Trustee  
23 300 Las Vegas Boulevard South, Suite 4300  
24 Las Vegas, NV 89101

25 ###

**EXHIBIT “B”**

RAY QUINNEY & NEBEKER

May 5, 2006

Via Facsimile & Via E-Mail

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Fidelity National Title  
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E-Mail: robert.bozarth@fnf.com

Re: In re USA Commercial Mortgage Company  
Bankruptcy No. BK-S-06-10725 LBR (Bankr. D. Nevada)

Dear Bob:

This is a follow-up letter to my letter earlier today, and also our discussions this afternoon.

I have been receiving repeated phone calls on these disbursement issues from Ken Schmidt, the principal for Binford Medical Developers. His project has been threatened with an immediate shutdown because of the failure of Fidelity National Title Insurance Company ("Fidelity") to honor its disbursement obligations under Binford's Construction Disbursement Agreement (the "Disbursement Agreement"). Moreover, Mr. Schmidt advises me that he has not received a single notice from Fidelity under the terms of his Disbursement Agreement, as Fidelity is obligated to do. Likewise, I am not aware of any written notice ever having been provided to USA Commercial Mortgage Company ("USA") as to Fidelity's reasons for not disbursing. It is astounding to us that Fidelity would take the actions that it has taken without providing any notice to any of the affected parties.

Even now, the only reason that we can discern for Fidelity's breach of contract is that Fidelity is uncomfortable in having to deal with a debtor-in-possession. Fidelity should not be uncomfortable because these disbursement issues are clearly in the ordinary course of business for a debtor-in-possession such as USA. I have previously cited to you the controlling case law in the Ninth Circuit on ordinary course of business transactions, which do not require any Bankruptcy Court approval.

You mentioned to me and Steve Strong this afternoon that Fidelity is concerned about the possible precedent from the "Motion for Order Authorizing

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Fidelity National Title  
May 5, 2006  
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the Return to Investors of Certain Escrowed Funds Intended for the Bundy Canyon Project" (the "Bundy Canyon Motion") that was filed in USA's Bankruptcy Case. I have attached a copy of the Bundy Canyon Motion.

Please note that it was **USA as Debtor-in-Possession, not any investor**, that filed the Bundy Canyon Motion. If USA as debtor-in-possession believed that the loan funds being held by Fidelity for disbursement to the borrowers belonged to the investors being serviced by USA, USA would hardly be demanding that Fidelity start making disbursements again to the borrowers.

As you can see from reading the Bundy Canyon Motion, it addresses a completely separate issue from the disbursement issues for the Meadow Creek, Binford Medical, ConVest Capital, Palm Harbor One, and Brookmere loans for which Fidelity is acting as disbursement agent. The funds involved in the Bundy Canyon Motion had been deposited with a title company in an escrow account, but the loan had not been closed or funded when USA's bankruptcy petition was filed, and USA determined to not complete the loan transaction, so the loan was never consummated.

As stated in the Bundy Canyon Motion, "[i]n the event that a loan is not consummated, Nevada law requires the funds held in the Escrow Account to be returned to the investors. Nev. Rev. Stat. 645B.175(2)(b)." Because the Bundy Canyon loan was not consummated, the Bundy Canyon funds were never funded to a disbursement agent such as Fidelity, and were in a position to be returned to the investors on an unfunded loan. The Bundy Canyon Motion does not have any impact on the Meadow Creek, Binford Medical, ConVest Capital, Palm Harbor One, and Brookmere loans, which have been consummated, with the associated loan funds having been sent to Fidelity, which is acting as disbursement agent.

You should also be advised that if Fidelity continues to exercise control over the interest reserves being held by Fidelity from which interest payments are to be made to USA as Servicer (and from which USA as Servicer is entitled to deduct its servicing fees), such acts to obtain possession of or to exercise control over property of USA's bankruptcy estate constitute a violation of the automatic stay under 11 U.S.C. § 362(a)(3) (the automatic stay went into effect upon the filing of USA's Chapter 11 bankruptcy petition). USA will hold Fidelity responsible for this violation of the automatic stay.

In addition, one of the related Debtors to USA in another bankruptcy case filed in Nevada, Capital First Trust Deed Fund, LLC, is a major investor in three of the loans for which Fidelity is acting as disbursement agent, Binford Medical, ConVest, and Brookmere. Fidelity's actions are damaging the collateral securing these loans and the interests of Capital First Trust Deed Fund, LLC, in these loans, for which Fidelity will also be responsible. As stated

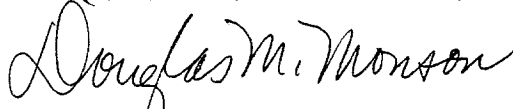


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before, USA demands that the authorized disbursements be made by Fidelity immediately.

Very truly yours,

RAY QUINNEY & NEBEKER P.C.

A handwritten signature in black ink that reads "Douglas M. Monson". The signature is fluid and cursive, with the first name "Douglas" being more prominent.

Douglas M. Monson

Enclosure

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**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

In re:

Case No. BK-S-06-10725 LBR

USA COMMERCIAL MORTGAGE  
COMPANY,

Chapter 11

Debtor.

**MOTION FOR ORDER AUTHORIZING THE  
RETURN TO INVESTORS OF CERTAIN  
ESCROWED FUNDS INTENDED FOR THE  
BUNDY CANYON PROJECT**

Hearing Date: OST PENDING  
Hearing Time: OST PENDING

USA Commercial Mortgage Company ("USACM"), the chapter 11 debtor in the above-captioned bankruptcy case, hereby moves this Court for authority to return to investors \$8.9 million in funds that are being held by a title company in an escrow account. In support of this

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1 Motion, USACM represents as follows.

2 **POINTS AND AUTHORITIES**

3 **Facts**

4 1. On April 13, 2006 (the "Petition Date"), USACM and certain of its affiliates  
5 (collectively, the "Debtors") filed petitions for relief under chapter 11 of the Bankruptcy Code.

6 2. Shortly before the Petition Date, USACM, acting as a mortgage broker, raised \$8.9  
7 million from 117 investors (the "Investors") in amounts ranging from \$50,000 to \$300,000. The  
8 \$8.9 million, which was deposited in a USACM bank account referred to as the "Investors Trust"  
9 account on various dates from March 27, 2006 through April 6, 2006, was intended to be invested  
10 as a secured loan to Bundy Canyon Land Development, LLC (the "Borrower") for a real estate  
11 project hereinafter referred to as the "Bundy Canyon Project" in Riverside County, California. A  
12 schedule of the Investors and the amounts invested is attached hereto as Exhibit A.

13 3. On April 6, 2006, the \$8.9 million deposited with USACM from the Investors was  
14 transmitted by wire transfer from USACM's "Investors Trust" account to an escrow account of  
15 Orange Coast Title Company (the "Title Company") in San Bernardino, California (the "Escrow  
16 Account"). A copy of the wire transfer report is attached hereto as Exhibit B.

17 4. On and after the Petition Date, the \$8.9 million raised from the Investors has  
18 remained in the Escrow Account. Since the Petition Date, USACM, through its court-approved  
19 Chief Restructuring Officer, Thomas Allison, has determined that the Borrower is approximately  
20 70% owned and/or controlled, directly or indirectly, by two former officers and principals of  
21 USACM, and that it would be in the best interest of the Debtors not to complete the loan  
22 transaction and not to release the \$8.9 million to the Borrower.

23 5. The Nevada Mortgage Lending Division ("MLD"), a state regulatory body within  
24 the Nevada Department of Business & Industry, has requested that USACM immediately return  
25 the \$8.9 million in the Escrow Account to the Investors. USACM believes that because the funds  
26 in the Escrow Account are directly traceable to the amounts invested by the Investors shortly  
27 before the Petition Date, from March 27, 2006 through April 6, 2006, and because USACM has  
28 determined not to fund the \$8.9 million loan to the Borrower, a return of the funds in the Escrow

Account to the Investors is appropriate.

**Memorandum of Law**

Nevada law requires that funds received by a mortgage broker from investors to acquire ownership or a beneficial interest in a loan secured by real estate must deposit the funds in: (a) a financial institution and be kept separate from money belonging to the mortgage broker, or (b) an escrow account controlled by an independent party. Nev. Rev. Stat. 645B.175(1). In this case, USACM, apparently, followed this rule. Therefore, the funds in the Escrow Account at the Title Company are directly traceable to specific investors. These funds are not property of the bankruptcy estate.

In the event that a loan is not consummated, Nevada law requires the funds held in the Escrow Account to be returned to the investors. Nev. Rev. Stat. 645B.175(2)(b).

**CONCLUSION**

WHEREFORE, USACM respectfully requests that the Court enter an order authorizing the Title Company to release the \$8.9 million held in the Escrow Account to USACM, and authorizing USACM to promptly return the \$8.9 million to the 117 Investors and in the amounts set forth on Exhibit A.

Dated: April 27, 2006.

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